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IN THE

Supreme Court of the United States

No. 292

ACME SPECIALTIES CORP., an Illinois Corp.,
Petitioner,

vs.

JOSEPH BIBB, Director of the Department of Public Safety, and

LATHAM CASTLE, Attorney General, State of Illinois,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

JAMES C. MURRAY
111 West Washington St.
Chicago, Illinois
Attorney for Petitioner

Of Counsel:
ERWIN H. GREENBERG
120 S. LaSalle St.
Chicago 3, Ill.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

To The Honorable, The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Acme Specialties Corporation, an Illinois corporation, petitioner, prays that a writ of *certiorari* issue to review the judgment of the Supreme Court of Illinois, entered in the above entitled cause on March 20, 1958.

OPINION BELOW:

The opinion of the Supreme Court of Illinois (No. 34684) is reported in 13 Ill. 2d 516; a copy thereof is attached hereto in Appendix A.

JURISDICTION.

(i) The judgment of the Supreme Court of Illinois was entered on March 20, 1958. (ii) The date of the order

denying a rehearing is May 23, 1958. (iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of *certiorari* is Title 28, U. S. C. A., Section 1257 (3).

QUESTIONS PRESENTED FOR REVIEW.

Acme Specialties Corp., petitioner, is the only manufacturer in Illinois engaged in the manufacture of the item known as a "sparkler". A sparkler is a novelty item consisting of a wire, partly coated with a composition which, when ignited, emits sparks as it burns, and as it burns consumes itself. In 1935 the Legislature of the State of Illinois enacted the first legislation dealing with fireworks. This act is concerned solely with regulating manufacture, storage and sale. In 1941 a separate act was enacted which prohibited the sale or use of fireworks generally. Until 1953 sparklers were expressly excluded from the definition of fireworks in both statutes, and their sale and use were expressly permitted at all times. In 1953, the 1941 Act was amended so as to remove the word "sparklers" from the exemptive list of fireworks, but by judicial decision of the Supreme Court of the State of Illinois, it was declared that this amendment did not prohibit the sale and use of sparklers. (*Acme Fireworks Corp.* v. *Bibb*, 6 Ill. 2d 112.) In 1957 the Illinois Legislature amended both the 1935 and 1941 Acts so as to specifically prohibit the sale or use of sparklers in the State of Illinois.

The questions presented for review are:

(1) Whether it is a denial of due process and an invasion of petitioner's personal and property rights within the meaning of the Federal Constitution to now completely prohibit the sale and use of sparklers in the State of Illinois, when it has been lawful for 22 years by specific legislative sanction to so sell and use them;

(2) Whether it is a denial of due process and an invasion of petitioner's personal and property rights within the meaning of the Federal Constitution to now completely prohibit the sale and use of sparklers in the State of Illinois when said prohibition will force petitioner out of business, destroy its capital investment therein and destroy its property acquired over a great number of years and at a substantial cost.

STATUTES INVOLVED:

Illinois Revised Statutes 1949, Chap. 38, pars. 276.1-276.25 is the 1935 Act as originally enacted, which is entitled "The Fire Works Regulation Act of Illinois". Paragraph 276.2 defines the term "fireworks". Paragraph 276.2(c) of said Act expressly exempts any building or other structure in which the manufacture of sparklers is carried on from the definition of "fireworks factory building". Illinois Revised Statutes 1949, Chap. 38, pars. 276.26-276.31 is the 1941 Act as originally enacted, which is entitled an "Act to Prohibit the Sale, Offering or Exposing for Sale of Fireworks, Defining Fireworks and to Regulate the Manner of Using Fireworks and to Provide Penalties for the Violation of the Provisions of the Act". This Act completely prohibited the sale and use of fireworks in Illinois. Paragraph 276.27 defines the term "fireworks", lists specifically the items which are included in the definition and specifically provides that the term "fireworks" shall not include sparklers, the sale and use of which shall be permitted at all times.

In 1951 the 1935 Act was amended, but again sparklers were expressly excluded from the definition of "fireworks", and any building or other structure in which the manufacture of sparklers was carried on was specifically ex-

empted from the definition of "fireworks factory building". (Ill. Rev. Stat. 1953, Sec. 276.2.)

In 1953 the 1941 Act was amended so as to redefine the term "fireworks". The amendatory act again specifically listed those items to be included within the new definition. Sparklers were not included in this list, although they were removed from the exemptive list. (Ill. Rev. Stat. 1953, Sec. 276.27.) It was this amendment which was judicially construed not to prohibit the sale and use of sparklers in the State of Illinois. (*Acme Fireworks Corp.* v. *Bibb*, 6 Ill. 2d 112.)

In 1957, the 1935 and 1941 Acts were amended so as to include sparklers in the list of items specifically falling within the definition of "fireworks", as redefined in the amendatory act of 1953, and to include a building or other structure in which the manufacture of sparklers is carried on within the definition of a "fireworks factory building". (Ill. Rev. Stat. 1957, Secs. 276.2 and 276.27.) The pertinent sections of the above statutes are set out *verbatim* in Appendix B.

STATEMENT OF THE CASE.

Acme Specialties Corp., petitioner, is an Illinois corporation organized under the laws of the State of Illinois on March 21, 1931 for the purpose, among others, of manufacturing, distributing and sale of sparklers and has been engaged in this business continuously from the date of its incorporation. Petitioner is the only one engaged in this business in the State of Illinois.

Petitioner operates its business all year around and sells its sparklers primarily in the State of Illinois. It has invested in equipment and machinery for the manufacture of sparklers a sum in excess of $100,000.00, and has had a

gross income from the sale of sparklers in the State of Illinois in excess of $500,000.00 per year.

Petitioner employs on an average more than fifty persons. Approximately 80% of its business is devoted to the manufacture and sale of sparklers, of which approximately 75% are sold in the State of Illinois. The business done by petitioner on the sale of sparklers outside of Illinois and on other items manufactured by it is not sufficient to sustain a continuation of petitioner's business.

The sparklers manufactured by petitioner do not contain magnesium, chlorate, perchlorate or any explosive material or compound; they contain only a wire coated with a mixture of a binder, aluminum, barium nitrate and iron filings.

The sparklers manufactured by petitioner are safe, useful and in no way inherently or intrinsically dangerous or harmful. A great number of petitioner's sparklers are sold to hotels, restaurants, caterers and banquet halls for decorative, display and illuminating purposes.

Petitioner's business is well known throughout the State of Illinois. It has maintained a good reputation for safety and fair dealing and by reason thereof has a considerable good will value as a good and successful business, which good will constitutes a valuable property right.

Soon after the effective date of the 1957 amendatory acts which prohibits the sale and use of sparklers in Illinois, petitioner filed a Complaint for Declaratory Judgment in the lower state court (abs. 1-16) alleging that said amendatory acts were illegal, unconstitutional, void and without force of law in that said amendments constituted a violation of due process of law contrary to

the provisions of the Illinois and United States Constitutions. Joseph Bibb, Director of the Department of Public Safety of the State of Illinois, charged by law with the administration of the Fireworks Acts, and Latham Castle, Attorney General of the State of Illinois, charged by law with the duty of enforcing said Fireworks Acts, were made parties defendant to this suit. Respondents (defendants there) filed a written motion to strike (abs. 16-17). The motion to strike set forth only one reason to substantiate the validity and constitutionality of the amendatory acts in question, and that was that sparklers may be used by children, and therefore the legislature may and has determined that their use by children is contrary to the public welfare and public safety. The lower state court considered the matter solely on the Complaint, the Motion to Strike and arguments of counsel. No evidence was heard. The trial court sustained the motion to strike and entered a formal judgment declaring the 1957 amendments to be constitutional insofar as they prohibit the sale, offering or exposing for sale of sparklers, and dismissing petitioner's Complaint. (abs. 19)

Petitioner appealed to the State Supreme Court, raising the federal question of denial of due process and the invasion of petitioner's personal and property rights within the meaning of the Federal Constitution.

The state court affirmed the judgment of the lower court and predicated its decision on three grounds:

(1) That since sparklers may be sold to persons who have permits for public displays, the 1957 amendatory acts do not forbid their sale or use.

(2) That if the sale of sparklers to persons without permits is forbidden, the incidence of injuries to children

would be reduced, and this constitutes a proper legislative objective, and

(3) That sparklers are fireworks and may be completely prohibited.

The stage in the proceedings in the court of first instance and in the Supreme Court of Illinois and the manner and method in which the federal questions sought to be reviewed were raised.

The federal questions were raised by allegations in the Complaint for Declaratory Judgment (abs. 1-16), by propositions of law orally argued to the trial court, and by points in the brief before the state supreme court.

The judgment of the trial court (abs. 19) contains a general finding that the amendatory acts in question are constitutional. The opinion of the state Supreme Court in affirming the judgment of the lower court necessarily makes the same finding of constitutionality. Although no specific reference is made to the federal questions raised, it is clear that a decision of the federal questions was necessary to the determination of this cause by the state courts, and that the federal questions were actually decided. It is also clear that the judgment as rendered and affirmed could not have been given without deciding the federal questions.

The copy of the judgment of the court below.

In Appendix C is a copy of the judgment of the state Supreme Court, and of its order denying the petition for rehearing of the petitioner herein.

ARGUMENT.

1. It is a denial of due process and an invasion of petitioner's personal and property rights within the meaning of the Federal Constitution for the State legislature to completely suppress and prohibit the sale and use of sparklers when regulation would have accomplished the avowed purpose of the legislature.

It is a fundamental rule of both Federal and Illinois constitutional law that every citizen is guaranteed the right to engage in any lawful business or trade. It is not within the constitutional authority of the State legislature, in the exercise of the police power, to interfere with the right of the individual to carry on a legitimate business where no interest of the public safety or welfare is damaged or threatened.

The uniform rule was stated by this Court in *New State Ice Co.* v. *Liebman*, 285 U.S. 262, p. 278:

> "Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business such as that under review (manufacture of ice) cannot be upheld consistently with the 14th Amendment. Under that Amendment nothing is more clearly settled than that it is beyond the power of a state under the guise of protecting the public arbitrarily to interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." (Parenthetical matter supplied.)

This constitutional doctrine has been repeatedly stated by the Illinois Supreme Court (see *The People* v. *Carolene Products Co.*, 345 Ill. 166; *Kennedy* v. *City of Evanston*, 348 Ill. 426; *Schiller Piano Co.* v. *Illinois Utilities Co.*,

288 Ill. 580; *The People* v. *City of Chicago*, 261 Ill. 16; *Lowenthal* v. *City of Chicago*, 313 Ill. 190.).

As a corollary to the above rule, there has sprung another well settled fundamental constitutional principle and that is where there may be some element of abuse, harm or detriment to the public welfare or safety in the operation of a business, such element may be a proper ground for reasonable regulation, but not for a complete suppression and prohibition of such business. While all businesses and occupations are subject to necessary or reasonable regulations and restrictions for the prevention of injury to the public, a citizen may not be denied the right to follow an avocation which is not inherently injurious, or in any way detrimental or dangerous when properly regulated. A state legislature may regulate when regulation will protect the public welfare, but may not suppress when suppression will injure the party pursuing a lawful business and proper regulation will afford the protection desired. Reasonable regulation is a proper exercise of the state police power. Suppression is a denial of due process.

Adams v. *Tanner*, 224 U.S. 590, is in point. Under the state statute there, the business of private employment agencies receiving fees for their services was prohibited. In holding the statute unconstitutional, this Court said, at page 594:

> "Because abuses may, and probably do, grow up in connection with this business is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctively useful calling in an upright way. Certainly there is no profession, possibly no business which does not offer peculiar opportunities for reprehensive practices; and as to every one of them, no doubt some can be found quite ready earnestly to

maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guarantees of the Constitution cannot be submerged if and whenever some ostensible justification is advanced and the police power invoked."

This doctrine has been repeatedly followed by the Illinois Supreme Court.

In the case of *The People* v. *Thillens*, 400 Ill. 224, the court cited *Adams* v. *Tanner*, *supra*, and stated:

"There is another feature of the case which requires examination. Where, in any business, elements of harm, injury or detriment to public welfare or safety of the public appear, requiring regulation for the public good, such elements of harm may be the proper ground for reasonable regulation, but they are not ground for a complete suppression and prohibition of the business, which in itself is innocent and harmless. An illustration of such principle will be found in *Adams* v. *Tanner*, 244 U.S. 590, where a State legislature prohibited the business of private employment agencies from receiving fees for their services. The Supreme Court held such a statute, prohibiting an entirely lawful and useful service, was in violation of the fourteenth amendment of the constitution, saying: 'Because abuses may, and probably do, grow up in connection with this business is adequate reason for hedging it about by proper regulation, but this is not enough to justify destruction of one's right to follow a distinctively useful calling in an upright way.' The same rule has been adhered to in *People* v. *Carolene Products Co.*, 345 Ill. 166."

The court, in *People* v. *Weiner*, 271 Ill. 74, emphatically and vigorously followed the doctrine of regulation as against complete prohibition.

(P. 80) "It is eminently proper to require that material be free from germs of contagion and infection before being used in mattresses, comfortes or quilts, whether the material be second-hand or new, but the possible danger to health or safety does not justify the absolute prohibition of a useful industry or practice where the danger can be dealt with by regulation. The act does not attempt to prohibit the use of second-hand mattresses but does prevent their ever being used in the manufacture of other mattresses which are to be sold. To prohibit absolutely the use of such material in the manufacture of mattresses for sale when not inherently dangerous and when it may be rendered safe by reasonable regulation is an invasion of personal and property rights within the meaning of the Federal and State constitutions. By this act the State has deprived the citizen of the lawful use of his property in a manner not injurious or dangerous to others."

For other Illinois cases in point, see *Figura* v. *Cummins*, 4 Ill. 2d 44; *City of Chicago* v. *Netcher*, 183 Ill. 104; *City of Chicago* v. *R & X Restaurant*, 369 Ill. 65; *Munn* v. *The People*, 69 Ill. 80 (affirmed 94 U.S. 113).

What abuses exist or what danger is threatened to the public welfare that requires complete suppression of the sale and use of sparklers and thereby the destruction of petitioner's business and property rights that have existed for 22 years? Respondents, in their motion to strike and dismiss, and in their brief in the state court, have admitted that the sole reason justifying complete suppression is that children may use sparklers and thereby may be injured. The State Court, in its opinion, also conceded that to be the legislative objective when it stated that "the legislature clearly expected that if the sale of sparklers to persons without permits were forbidden, the incidence of injuries to children would be reduced. That is a proper legislative objective".

If this be the objective of the legislature, and it has been so conceded by the respondents and by the State Court, then may not this objective be achieved by regulation — by prohibiting the sale of sparklers to persons under a designated age? Would this not achieve the legislative purpose without the destruction of the valuable and extensive property rights that have vested in petitioner? Is the legislature of Illinois to be permitted to destroy petitioner's rights by suppression in order to achieve a certain designated objective, when that objective may be attained and petitioner's rights also preserved by regulation.

It has not been contended by respondents or by the State Court that it is necessary to protect citizens of adult years from any possible danger arising from the use of sparklers. Though it is the avowed purpose of the legislature to protect children from the use of sparklers, nevertheless, all other segments of the citizenry of the State of Illinois are also prohibited from using them if they so desire.

Other regulatory measures could have been adopted by the legislature to prevent any possible danger to children arising from the sale of sparklers. Pyrotechnic composition of sparklers could be restricted; size and weight could be regulated; time of sale could be defined.

The legislatures of the states of Alabama and Wisconsin, which recently made the sale of sparklers legal in those states where in the past their sale was illegal, restricted the weight, size, and composition of sparklers that may be sold. The legislatures of the States of Missouri and Tennessee, which recently enacted initial fireworks legislation, restricted time of sale, weight, size and composition of sparklers. We specifically call to this Court's attention, as we did to the State Court, the new fireworks act enacted by the State of California as an

example of a thorough and comprehensive regulation of the sale of sparklers and fireworks—regulations which, without question, will protect the public welfare without the necessity of complete suppression. In spite of the rule favoring regulation over complete suppression so plainly laid down by this Court and the State Court, the State Court sanctioned complete suppression in this case. It is the power of regulation of the sale and use of sparklers petitioner concedes the legislature of the State of Illinois possesses. To completely suppress, as it has done in this instance, when regulation would undoubtedly achieve the legislative objective, is to deny to petitioner due process and to take away petitioner's property rights without due process of law.

2. It is a deprivation of petitioner's property without due process for the State legislature to now make the sale and use of sparklers illegal when it has expressly sanctioned their sale and use for 22 years.

As heretofore stated the first regulatory legislation in Illinois concerning fireworks was enacted in 1935 and expressly excluded sparklers from the definition of fireworks. In 1941 the first prohibitory legislation concerning fireworks was enacted and again sparklers were excluded from the definition of fireworks and their sale and use were permitted at all times. Petitioner was incorporated under the laws of the State of Illinois on March 21, 1939 for the purpose, among others, of manufacturing, distributing and sale of sparklers and has engaged in said business continuously from the date of its incorporation. Petitioner has invested in equipment for the manufacture of sparklers a sum in excess of $100,000 and has developed its business where it now grosses over $500,000.00 per year.

It is readily apparent that at the time petitioner commenced business, the sale and use of sparklers in Illinois

were declared lawful by statute. In full reliance upon this legislative pronouncement and upon subsequent reaffirmation, petitioner commenced and continued the manufacture and sale of sparklers and invested and has subsequently invested large sums of money in said business. In 1957, no change of circumstances existed differing from those that existed in 1935 and in 1941 to warrant the withdrawal of the legislative sanction. A sparkler in 1957 is no different from a sparkler in 1935 and in 1941, except, indeed, that it is safer now, because of technical advances in machinery and materials. No grounds whatsoever prevailed in 1957 for complete suppression of the sale of sparklers that did not exist in 1935 and 1941.

The enactment of the 1957 amendments is an arbitrary and unconstitutional exercise of the police power by the state legislature and if upheld will force petitioner out of a business established and investment made therein in reliance upon statutory declaration.

Certainly, a citizen has a right to rely upon statutory pronouncement. Certainly, he has a right to expect that any investment made in reliance upon statutory pronouncement will be protected insofar as circumstances remain the same. Certainly, to permit a state legislature to withdraw the sanction expressly given merely upon a capricious and arbitrary legislative change of mind based upon no tangible change of circumstances is taking property without due process and an invasion of personal and property rights within the meaning of the Federal Constitution.

The Supreme Court of Illinois, in *City of Chicago v. Netcher*, 183 Ill. 104, at page 110, eloquently expressed this principle as follows:

> "The liberty of the citizen includes the right to acquire property, to own and use it, to buy and sell it. It is a

necessary incident to the ownership of property that the owner shall have a right to sell or barter it, and this right is protected by the constitution as such an incident of ownership. When an owner is deprived of the right to expose for sale and sell his property he is deprived of property, within the meaning of the constitution, by taking away one of the incidents of ownership. *Liberty includes the right to pursue such honest calling or avocation as the citizen may choose, subject only to such restrictions as may be necessary for the protection of the public health, morals, safety and welfare. The State, for the purpose of public protection, may, in the proper exercise of the police power, impose restrictions and regulations, but the right to acquire and dispose of property is subject only to that power.* That the individual may pursue, without let or hindrance from any one, all such callings or pursuits as are innocent in themselves and not injurious to the public. These are fundamental rights of every person living under this government. The legislature can neither by any enactment of its own interfere with such rights, nor authorize a municipal corporation to do so." (Emphasis supplied.)

3. The State Court opinion, in holding that sparklers are fireworks, disregarded the expressed intention of the Illinois Legislature for the past 22 years and the 1957 decision of the U. S. Interstate Commerce Commission that sparklers of the type manufactured by petitioner are not fireworks.

Petitioner had cited before the State Court the 1935 and 1941 Fireworks Acts, with amendments thereto, in which by specific legislative determination, it was declared that sparklers were excluded from the definition of fireworks as defined by the state legislature and therefore not fireworks. Petitioner also cited Sec. 73.000 (r) (8), as amended by Interstate Commerce Commission Notice 29 dated January 25, 1957, of the United States Interstate Commerce

Commission Regulations, Title 49, Code of Federal Regulations, which defines fireworks and reads as follows:

> "Common fireworks are fireworks devices suitable for use by the public and designed primarily to produce visible effects by combustion. Some small devices designed to produce audible effects are also included in this class. The types, sizes and amount of pyrotechnic contents of these devices are limited as enumerated in this paragraph. No component of any device listed in this paragraph which is designed to produce an audible effect shall contain pyrotechnic composition in excess of two grains in weight (propelling or expelling charges consisting of a mixture of sulphur, charcoal and saltpeter are not considered as designed to produce audible effects.) Any new device, not enumerated in this paragraph, must be approved by the Bureau of Explosives before being offered for transaction as a common fireworks. Common fireworks must be in a finished state exclusive of mere ornamentation as supplied to the retail trade and must be so constructed and packed that loose pyrotechnic composition will not be present in packages in transportation. Fireworks, except articles defined in paragraphs (a) through (y) inclusive of this section, other than common fireworks as defined in this paragraph, and those forbidden for transportation in Sec. 73.51 are classed as Special Fireworks. • • •
>
> (8) • • • Sparklers, the composition of which does not exceed 100 grams each and which contain no magnesium or magnesium and a chlorate or perchlorate are not subject to the regulations in Parts 71-78 and 197 of this chapter."

Petitioner also cited to the State Court the legislative action taken by sister States in connection with sparklers since 1950—*i.e.* ten states took action in regard to sparklers and either continued their legality or made them legal where theretofore they were illegal. (see Appendix D).

It is only Illinois that has made sparklers illegal where they were theretofore legal. Despite the citation of the above authorities the state court relied entirely on Webster's New International Dictionary as authority for its determination that sparklers are fireworks and therefore subject to complete suppression and prohibition.

If sparklers are not fireworks, as petitioner contends, no legitimate reason exists for the legislature to completely suppress and prohibit their sale, as distinct fom regulating their sale. Such a prohibition and suppression exceeds the lawful limits to which the state police power may be used as a crutch to support the validity of legislative acts, and constitutes a denial of due process and an invasion of personal and property rights within the meaning of the Federal Constitution.

4. The State Court misconceived the provisions of the 1957 amendments when it stated in its opinion that said amendments do not forbid the sale and use of sparklers.

The State Court misconceived the items and provisions of the 1957 Amendments in holding that said amendments do not forbid the sale and use of sparklers.

The State Court, in its opinion, stated:

> "The plaintiff manufactures and sells sparklers which are useful only for amusement or entertainment but which are undeniably capable of causing injuries -- particularly to small children. The legislation before us does not forbid their sale or use, and it is therefore unnecessary to consider whether their minimal usefulness, weighed against their capacity for causing harm, would justify a complete prohibition of manufacture and use."

Section 276.28, Ch. 38 of the Illinois Revised Statutes 1957 specifically prohibits the offering for sale, exposing

for sale, sale at retail or the use of sparklers, except that permits may be granted for supervised public displays by competent individuals designated by the local authorities.

There can be no doubt that the sale of sparklers to the general public has been prohibited. The fact that sparklers may be sold to licensed persons for public display is of no consequence whatsoever. The amount of sparklers that would be used for public display is infinitesimal. To declare that because sales may be made to licensed individuals for public display, and therefore the amendments in question do not prohibit the sale and use of sparklers is in effect avoiding reality and failing to recognize the situation as it exists.

It is upon this erroneous postulate—that is that the amendments do not prohibit the sale or use of sparklers—that the State Court found that "it is therefore unnecessary to consider whether their (sparklers) minimal usefulness, weighed against their capacity for causing harm, would justify a complete prohibition of manufacture and use". The State Court therefore recognized the distinction between complete prohibition and regulation and the illegality of the former and the legality of the latter. The State Court, however, failed to consider this principle because of its misconception of the effect of the amendments in question. It is respectfully submitted that had the State Court correctly construed the amendments in question, and had therefore considered the question of complete suppression as weighed against regulation, it would have arrived at a different conclusion.

5. As the State Court recognized that the sole purpose of the legislature in enacting the 1957 amendments was to reduce possible injuries to children, it fortified petitioner's contention that this purpose could have been accomplished by regulation instead of by prohibition.

The State Court, in its opinion, stated:

> "So far as sale and use are concerned, the legislature clearly expected that if the sale of sparklers to persons without permits and the use of sparklers by persons without permits were forbidden the incidence of injuries to children would be reduced. That is a proper legislative objection, and it is not suggested that the means employed are unreasonable."

Petitioner does not admit that the incidence of injuries to children have been such so as to warrant prohibition. But conceding for the sake of argument that this is a proper legislative objective, the state court obviously misapprehended petitioner's theories and argument in support of them when it stated that it has not been suggested that the means employed to attain this legislative objective are unreasonable. It has been petitioner's constant and consistent argument that the means employed to attain the legislative objective of reducing the incidence of possible injuries to children is not only unreasonable, but arbitrary and invalid as well. It has been petitioner's argument, as indicated in the opinion, that this objective could have been achieved just as well by regulation rather than by the means employed—complete prohibition. Regulation forbidding the sale of sparklers to persons under a designated age, regulations restricting the pyrotechnic composition of sparklers, their size and weight, regulations restricting time of sale—all of these could have achieved the legislative purpose. But instead, the legislature chose the one method which will also completely render useless

and thereby effectively destroy the property rights which have accrued to petitioner over the past 18 years. It is this method that petitioner most certainly suggests is unreasonable. It is this method that this Court as well as the Illinois Supreme Court has held many times in the past to be not only unreasonable but unconstitutional, yet the State Court found it unnecessary to consider whether a complete prohibition of the sale and use of sparklers was justified in this case. The State Court obviously misapprehended petitioner's argument and had it correctly construed said argument, it would have reached a different conclusion.

6. The State Court's opinion, if permitted to stand, will permit the Legislature of the State of Illinois to deprive petitioner of substantial personal and property rights, in violation of the due process clauses of the United States Constitution and the Constitution of the State of Illinois.

If the State Court's opinion is permitted to stand, the sale and use of sparklers in the State of Illinois will be prohibited. As petitioner's business primarily consists of the manufacture and sale of sparklers in the State of Illinois, it will be forced out of business, a business which has been developed over the years and now constitutes a valuable property right. Petitioner has invested in equipment for the manufacture of sparklers a great sum of money. This equipment is of a highly specialized nature, and cannot be converted to other uses. Thus by this legislation, petitioner's business and its capital investment therein, will be utterly destroyed and taken away, without any compensation whatsoever.

May the Legislature of the State of Illinois destroy one valuable property right without just compensation in order to ostensibly preserve another? May it wantonly destroy this property right even though it could have preserved

it by other means which would also preserve the other right? It is to a situation such as is present here that the due process clause of the United States Constitution has unique application.

The State Court has stated that petitioner may continue to manufacture sparklers. In theory, this is correct, but if sparklers cannot be sold in Illinois, then no reason for manufacture exists. It is clear that if the State Court's opinion is permitted to stand, petitioner will be deprived of its personal and property rights without any compensation whatsoever.

CONCLUSION.

It is submitted that the 1957 amendments to the 1935 and 1941 Illinois Fireworks Acts have denied to petitioner due process and has unjustifiably invaded its personal and property rights. It is contended that the State Court misconceived the purport and intent of said amendments and placed its decision on the misconception that the sale and use of sparklers are not prohibited by said amendments. It is further contended that the State Court, in apparent contradiction of its interpretation of said amendments, refused to consider whether complete prohibition of the sale and use of sparklers was justified.

This case is important in the consequences to petitioner, its employees, its supplhers and its stockholders. If the opinion of the State Supreme Court is permitted to stand, petitioner will be forced to quit business, will lose its huge capital investment, will be forced to dispose of its machinery and equipment at salvage value; its suppliers will lose a large and valuable account; its employees will lose their jobs; its stockholders will lose their investment.

The State Supreme Court has failed to recognize petitioner's federal rights; this Court is petitioner's last recourse.

Petitioner therefore prays that its petition for writ of certiorari be granted.

Respectfully submitted.

JAMES C. MURRAY
Attorney for Petitioner.

ERWIN H. GREENBERG
Of Counsel

APPENDIX A.

The opinion of the Supreme Court in the instant case:

Docket No. 34684—Agenda 48—January, 1958.

Acme Specialties Corp., Appellant, v. Joseph Bibb, Director of the Department of Public Safety, *et al.*, Appellees.

MR. JUSTICE SCHAEFER delivered the opinion of the court:

Plaintiff filed a complaint for a judgment declaring that the 1957 amendments to the statutes dealing with fireworks are unconstitutional. The complaint was dismissed upon motion of the defendants, and the plaintiff appeals directly to this court.

Two statutes, one enacted in 1935 and the other in 1941, deal with fireworks. The 1935 act is concerned primarily with their manufacture, storage and sale. (Ill. Rev. Stat. 1957, chap. 38, pars. 276.1-276.26.) The 1941 act prohibits the sale or use of fireworks generally, but allows their use in public displays for which permits have been issued by local units of government. Sale of fireworks to holders of such permits is permitted. Ill. Rev. Stat. 1957, chap. 38, par. 276.27-276.31.

Until 1953 sparklers were expressly excluded from the definition of fireworks in both statutes. In *Acme Fireworks Corp.* v. *Bibb*, 6 Ill. 2d 112 (1953), it was held that the 1953 amendments to the 1941 act did not clearly express a legislative purpose to include sparklers within the definition of fireworks in that act. The parties agree that the 1957 amendments have eliminated all doubt, and that both the 1935 and the 1941 acts are now applicable to sparklers.

The plaintiff argues that sparklers are not fireworks, and that section 13 of article IV of the constitution is vio-

lated when provisions governing them are included in a statute whose title is "An Act to prohibit the sale, offering or exposing for sale of fireworks; defining fireworks and to regulate the manner of using fireworks, and to provide penalties for the violation of the provisions of the Act." This contention is without merit. A sparkler is defined as "a firework consisting usually of a heavy wire partly coated with a composition which on burning emits brilliant sparks." (Webster's New International Dictionary, 2d ed., Unabridged; see also, Oxford Universal Dictionary.) Since sparklers are fireworks, provisions concerning them can of course be included in a bill that states its purpose to regulate fireworks.

The core of plaintiff's contention that the act is invalid seems to lie in its assertion that while the General Assembly may regulate sparklers, it may not prohibit their sale or use. In support of this contention it cites cases in which sparklers were held not to be "inherently dangerous" when recovery was sought against the manufacturer or seller for burns that children received while playing with them. (See *e.g.*, *Beznor* v. *Howell*, 203 Wis. 1, 233 N.W. 758.) It is then argued that since sparklers are not inherently dangerous, their sale can not be prohibited. Certainly the legislature cannot interfere with the right to engage in a lawful business which threatens no public interest. (*People* v. *Weiner*, 271 Ill. 74; *People ex rel. Barrett* v. *Thillens*, 400 Ill. 224; *Figura* v. *Cummins*, 4 Ill. 2d 44.) But its power to act in the interest of public safety does not depend upon whether the thing with which it deals has, or has not, been classified for other purposes as "inherently dangerous."

The plaintiff manufactures and sells sparklers which are useful only for amusement or entertainment, but which are undeniably capable of causing injuries—particularly to

small children. The legislation before us does not forbid their sale or use, and it is therefore unnecessary to consider whether their minimal usefulness, weighed against their capacity for causing harm, would justify a complete prohibition of manufacture and use. The plaintiff can continue to manufacture sparklers, and it can continue to sell them to persons who are authorized to purchase them for use in public displays. So far as manufacture is concerned, the plaintiff does not question the validity of any of the regulations that govern the manufacture of sparklers. So far as sale and use are concerned, the legislature clearly expected that if the sale of sparklers to persons without permits and the use of sparklers by persons without permits were forbidden, the incidence of injuries to children would be reduced. That is a proper legislative objective, and it is not suggested that the means employed are unreasonable.

The fact that until now the legislature has not limited the sale or use of sparklers is immaterial. The power of the legislature to act with respect to evils that it recognizes is not conditioned upon the promptness with which it recognizes them.

The judgment is affirmed.

Judgment affirmed.

APPENDIX B.

The statutes involved:

Ill. Rev. St. 1949, Ch. 38: (Filed July 11, 1935, L. 1935, p. 881)

ARTICLE 276.2. DEFINITIONS

The following words and phrases, when used in this Act, shall for the purpose of this Act have the following definition and meaning:

(a) The term "fireworks" shall mean and include any combustible or explosive compositions, or any substance or combination of substances or articles prepared for the purpose of producing a visible or audible effect by combustion, explosion, deflagration or detonation.

(b) The term "fireworks plant" shall mean and include all lands, with buildings thereon, used in connection with the manufacturing or processing of fireworks, as well as storehouses located thereon for the storage of finished fireworks.

(c) The term "fireworks factory building" shall mean any building or other structure in which the manufacture of fireworks, other than sparklers, is carried on.

(d) The term "magazine" shall mean any building or other structure used for the storage of explosive raw materials used in the manufacture of fireworks.

Ill. Rev. St. 1949, Ch. 38: (approved July 1, 1941, L. 1941, vol. 2, p. 430)

ARTICLE 276.27: "FIREWORKS" DEFINED.

The term fireworks shall mean and include any explosive composition, or any substance or combination of substances, or article prepared for the purpose of producing an audible effect by explosion, deflagration or detonation, and shall include blank cartridges, toy cannons, in which explosives are used, the type of balloons which require fire underneath to propel the same, firecrackers, torpedoes, skyrockets, Roman candles, bombs or other fireworks of like construction and any fireworks containing any explosive compound, or any tablets or other device containing any explosive substance; provided, however, that the term "fireworks" shall not include sparklers, toy pistols, toy canes, toy guns or other devises in which paper caps containing twenty-five hundredths grains or less of explosive compound are used, providing they are so constructed that the hand cannot come in contact with the cap when in place for the explosion, and toy pistol paper caps which contain less than twenty hundredths grains of explosive mixture, the sale and use of which shall be permitted at all times.
Ill. Rev. St. 1953, Ch. 38:

ARTICLE 276.2. DEFINITIONS

The following words and phrases, when used in this Act, shall for the purpose of this Act have the following definition and meaning

(a) The terms fireworks shall mean and include any explosive composition or any substance or combination of substances, or articles prepared for the purpose of producing an audible effect by explosion, or detonation, and shall include blank cartridges, toy cannons in which explosives are used, the type of balloons which require fire underneath to propel the same, firecrackers, torpedoes, sky

rockets, Roman Candles, bombs or other fireworks of like construction and any fireworks containing any explosive compound; or any tablets or other device containing any explosive substance; provided, however, that the term "fireworks" shall not include sparklers, toy pistols, toy canes, toy guns, or other devices in which paper caps containing twenty-five hundredths grains or less of explosive compound are used, provided they are so constructed that the hand cannot come in contact with the cap when in place for the explosion, and toy pistol paper caps which contain less than twenty-five hundredths grains of explosive mixture, the sale and use of which shall be permitted at all times.

(b) The term "fireworks plant" shall mean and include all lands, with buildings thereon, used in connection with the manufacturing or processing of fireworks, as well as storehouses located thereon for the storage of finished fireworks.

(c) The term "fireworks factory building" shall mean any building or other structure in which the manufacture of fireworks, other than sparklers, or in which any processing involving fireworks other than sparklers, is carried on.

(d) The term "magazine" shall mean any building or other structure used for the storage of explosive raw materials used in the manufacture of fireworks.

(e) The term "Department shall mean the Department of Public Safety. (as amended by act approved Aug. 2, 1951. L. 1951, p. 1916)

ARTICLE 276.27. FIREWORKS DEFINED.

The term fireworks shall mean and include any explosive composition, or any substance or combination of substances, or article prepared for the purpose of producing

an audible effect by explosion, deflagration or detonation, or for the purpose of producing visual effects and shall include blank cartridges, toy cannons, in which explosives are used, the type of balloons which require fire underneath to propel the same, firecrackers, torpedoes, sky-rockets, Roman candles, bombs, or other fireworks of like construction and any fireworks containing any explosive compound, or any tablets or other device containing any explosive substance, or containing combustible substances producing visual effects; provided, however, that the term "fireworks" shall not include toy pistols, toy canes, toy guns or other devices in which paper caps containing twenty-five hundredths grains or less of explosive compound are used, providing they are so constructed that the hand cannot come in contact with the cap when in place for the explosion, and toy pistol paper caps which contain less than twenty hundredths grains of explosive mixture, the sale and use of which shall be permitted at all times. (as amended by act approved July 16, 1953. L. 1953) *Ill. Rev. St. 1957, Ch. 38:*

ARTICLE 276.2. DEFINITIONS.

The following words and phrases, when used in this Act, shall, for the purpose of this Act have the following definition and meaning:

(a) The term "fireworks" shall mean and include any explosive composition or any substance or combination of substances, or article prepared for the purpose of producing a visible or audible effect of a temporary exhibitional nature by explosion, combustion, deflagration or detonation, and shall include blank cartridges, toy cannons, in which explosives are used, the type of balloons which require fire underneath to propel the same, firecrackers, torpedoes, sky rockets, Roman candles, sparklers, bombs

or other fireworks of like construction and any fireworks containing any explosive compound; or any tablets or other device containing any explosive substance, or containing combustible substances producing visual effects, provided, however, that the term "fireworks" shall not include toy pistols, toy canes, toy guns, or other devices in which paper caps containing twenty-five hundredths grains or less of explosive compound are used, provided they are so constructed that the hands cannot come in contact with the cap when in place for the explosion, and toy pistol paper caps which contain less than twenty five hundredths grains of explosive mixture, the sale and use of which shall be permitted at all times.

(b) The term "fireworks plant" shall mean and include all lands with buildings thereon, used in connection with the manufacturing or processing of fireworks, as well as storehouses located thereon for the storage of finished fireworks.

(c) The term "fireworks factory building" shall mean any building or other structure in which the manufacture of fireworks, or in which any processing involving fireworks, is carried on.

(d) The term "magazine" shall mean any building or other structure used for the storage of explosive raw materials used in the manufacture of fireworks.

(e) The term "Department" shall mean the Department of Public Safety. (as amended by act approved July 8, 1957.)

ARTICLE 276.27. FIREWORKS DEFINED

The term "fireworks" shall mean and include any explosive composition, or any substance or combination of substances, or article prepared for the purpose of producing a visible or audible effect of a temporary exhibitional nature by explosion, combustion, deflagration or detonation, and shall include blank cartridges, toy cannons, in which explosives are used, the type of balloons which require fire underneath to propel the same, fire crackers, torpedoes, skyrockets, Roman candles, sparklers, bombs or other fireworks of like construction and any fireworks containing any explosive compound, or any tablets or other device containing any explosive substance, or containing combustible substances producing visual effects: provided, however, that the term "fireworks" shall not include toy pistols, toy canes, toy guns, or other devices in which paper caps containing twenty five hundredths grains or less of explosive compound are used, providing they are so constructed that the hand cannot come in contact with the cap when in place for the explosion, and toy pistol paper caps which contain less than twenty hundredths grains of explosive mixture, the sale and use of which shall be permitted at all times. (as amended by act approved July 8, 1957)

ARTICLE 276.28 SALE, USE OR EXPLOSION OF FIREWORKS PROHIBITED — PUBLIC DISPLAYS — PERMITS.

Except as hereinafter provided it shall be unlawful for any person, firm, co-partnership, or corporation to offer for sale, expose for sale, sell at retail, or use or explode any fireworks: provided that city councils in cities, the president and board of trustees in villages and incorporated towns and outside the corporate limits of

cities, villages and incorporated towns, the board of county commissioners in counties not under township organization, and the board of supervisors in counties under township organization, shall have power to adopt reasonable rules and regulations for the granting of permits for supervised public displays of fireworks. Every such display shall be handled by a competent individual designated by the local authorities herein specified and shall be of such a character and so located, discharged or fired as not to be hazardous to property or endanger any person or persons. Application for permits shall be made in writing at least fifteen (15) days in advance of the date of the display and action shall be taken on such application within forty-eight (48) hours after such application is made. After such privilege shall have been granted, sales, possession, use and distribution of fireworks for such display shall be lawful for that purpose only. No permit granted hereunder shall be transferable.

Permits may be granted hereunder to any groups of three (3) or more adult individuals applying therefor. No permit shall be required, under the provisions of this Act, for supervised public displays by State or County fair associations. (Approved July 1, 1941. L. 1941, vol. 2, p. 430)

APPENDIX C.

FINAL ORDER OF SUPREME COURT OF ILLINOIS

Be It Remembered, that, to-wit: on the 20th day of March, 1958, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

Acme Specialties Corp., an Illinois corporation, Appellant vs. Joseph Bibb, Director of the Department of Public Safety, State of Illinois, and Latham Castle, Attorney General, State of Illinois, Appellees	Appeal from Superior Court Cook County 57S 11477 Error to
No. 34684	

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Superior Court of Cook County aforesaid, Be Affirmed In All Things And Stand In Full Force And Effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellees recover of and from the said appellant costs by them in this behalf expended, to be taxed, and that they have execution therefor.

I, Mrs. Earle Benjamin Searey, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 26th day of May, 1958.

(Seal)

/s/ Mrs. Earle Benjamin Searey
Clerk.
Supreme Court of the State of Illinois.

Be It Remembered, that, to-wit: on the 23rd day of May, A.D. 1958, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

Acme Specialties Corp., an Illinois corporation, Appellant		
No. 34684	vs.	Appeal from
Joseph Bibb, Director of the Department of Public Safety, State of Illinois, et al., etc., Appellees.		Superior Court Cook County

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises doth overrule the prayer of the petition and denies a rehearing in this cause.

APPENDIX D.

Action in other states in regard to sparklers.

1. ALABAMA—Ala. Code 1940, Sec. 125 (7) Ch. 36, as amended September 9, 1955. Since 1949 sparklers were illegal in Alabama. By virtue of the 1955 amendment, sparklers which do not exceed 100 grains of pyrotechnic composition in weight and do not contain more than five grams of chlorate or perchlorate were excluded from the prohibition of sale of fireworks.

2. ARKANSAS—Arkansas Statutes, Ch. 33, Sec. 41-3308-9. Only toy pistols and cannon crackers were illegal in Arkansas until 1953, when the above statute was repealed in toto by Acts 1953, No. 554, Sec. 1.

3. CALIFORNIA—In 1931, California enacted its initial fireworks statute which was limited to an itemized list of "dangerous fireworks" with no mention made of sparklers. (Deering's California Code Anno. Health and Safety Vol. 1, Section 12500). In 1955 this statute was repealed and a comprehensive act passed. The new act divides fireworks into "dangerous fireworks" and "safe and sane fireworks". (Sec. 12503 and 12504). Sparklers more than ten inches in length or 1/4 of an inch in diameter are listed as "dangerous fireworks". All other types of sparklers are regarded as "safe and sane fireworks" and may be sold in the State at retail from June 28th to July 6th. No limitation as to time exists in regard to sale of sparklers at the wholesale level.

4. COLORADO—Colorado Revised Statutes, Ch. 53, Sec. 535-1 prohibits fireworks producing a visual or auditory sensation by combustion, explosion, deflagration or

detonation. In 1953 this section was amended to expressly exclude sparklers from the definition of the term "fireworks" (Session Laws, Colorado, 1953 Ch. 115).

5. FLORIDA—Florida Statutes Anno. Title 44, Section 791.01 adopted in 1941, defined sparklers as fireworks. In 1957 Sec. 791.01 was amended to expressly exclude sparklers from the definition of fireworks. (1957 Florida Session Laws. Ch. 57-338, House Bill No. 725.)

6. KANSAS—No prohibitory or regulatory statute of any kind pertaining to fireworks or sparklers.

7. LOUISIANA—No prohibitory or regulatory statute of any kind pertaining to fireworks or sparklers.

8. MICHIGAN—Michigan Stat. Anno., Title 28, Ch. 28.440 prohibits sale of fireworks but permits sale of sparklers containing not more than .0125 pounds of burning portions per sparkler.

9. MISSISSIPPI—Title 11, Ch. 1, Sec. 2156, Miss. Code only makes it illegal to explode fireworks in any unincorporated town or village within 300 yards of any railroad depot, cotton or hay warehouse or any cotton yard. Otherwise, there is no prohibitory or regulatory statute of any kind.

10. MISSOURI—In 1957 initial legislation to regulate the manufacture and sale of fireworks was enacted (Mo. Anno. Stat. Ch. 320, Sec. 320.110 to 320.190). Sec. 320.120 permits and approves of the manufacture and sale of fireworks that are classified as "common fireworks" by the Interstate Commerce Commission and are labeled with I.C.C. Class C label. Sparklers are not regarded as fireworks by I.C.C. regulations. Permissible fireworks may be sold at retail between June 20th to July 10th and December 10th to January 5th.

11. MONTANA—Title 69, Sec. 69-2701, Mont. Stat. enacted in 1947 excludes sparklers from the definition of the term fireworks and makes their sale and use permissible at all times. In 1957 this section was repealed and substituted therefor was the following definition of "fireworks": "As known and defined under the I.C.C. regulations for the transportation of explosives and other dangerous articles as Class B fireworks requiring a red label for shipment of the same in interstate commerce and specifically including sky rockets." Sparklers are not regarded as fireworks by I.C.C. regulations.

12. NEBRASKA—Ch. 28, Sec. 28-1003.01. Revised Stat. of Nebraska specifically makes the sale of sparklers at retail permissible along with other specified items from June 27th to July 5th.

13. NEW MEXICO—3 New Mexico Stat. Anno. Sec. 41-1808 prohibits sale of explosive fireworks. Attorney General's Opinion No. 5225 (1949-1950) holds sparklers are not prohibited.

14. NORTH DAKOTA—North Dakota Revised Code, Ch. 23-15, Sec. 23-1501 defines fireworks as those articles prepared for the purpose of producing a visible or an audible effect only by explosion or detonation. Sparklers are not included in the specified list of prohibited fireworks.

15. OKLAHOMA—No prohibitory or regulatory statute of any kind pertaining to fireworks or sparklers.

16. OREGON—Oregon Revised Stat. Ch. 480, Sec. 480-110 expressly excludes sparklers from the definition of the term "fireworks".

17. SOUTH CAROLINA—Title 66, Code of Laws, Sec. 66-552, expressly excludes sparklers from the prohibition of sale or use of fireworks.

18. SOUTH DAKOTA—South Dakota Code, Ch. 13.16, Sec. 13.1609-1 expressly excludes sparklers from the prohibition of sale of all fireworks of any description.

19. TENNESSEE—In 1957 initial legislation pertaining to fireworks was enacted (Tenn. Public Acts. 1957, Ch. 45, P. 142). The Act defines fireworks but expressly excludes from the definition sparklers of pyrotechnic composition not exceeding ten grams each in weight which shall not include any chlorate or perchlorate.

20. TEXAS—In 1957 initial legislation pertaining to fireworks was enacted. (1957 Vernon's Texas Session Laws. No. 6, P. 1446). The act prohibits sale of fireworks but expressly permits sale of sparklers.

21. UTAH—Title 10, Ch. 3, Sec. 11-3-2, Utah Code Anno. prohibits sale of fireworks but expressly excludes sparklers from provisions of act.

22. VIRGINIA—No prohibitory or regulatory statute pertaining to fireworks or sparklers.

23. WASHINGTON—Ch. 70.77, Sec. .010 to .110, Washington Stat. prohibits sale of all fireworks and sparklers except between June 25th to July 5th, when they may be sold.

24. WISCONSIN—From 1947 to 1957 sparklers were prohibited. (Wis. Stat. 240.70 (1)). However, in 1957 this statute was amended so as to permit the sale of gold star producing sparklers which contain no magnesium, chlorate or perchlorate. (West's Wis. Legislative Service, No. 3, p. 655).

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 292

ACME SPECIALTIES CORP., an Illinois Corp.,
Petitioner.

vs.

JOSEPH BIBB, Director of the Department of Public Safety, and
LATHAM CASTLE, Attorney General, State of Illinois,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

CERTIFICATE OF SERVICE APPENDED.

LATHAM CASTLE,
Attorney General of the State of Illinois,
160 N. La Salle Street, Suite 900,
Chicago 1, Illinois (FI 6-2000)
Counsel for Respondents.

WILLIAM C. WINES,
Assistant Attorney General.
Of Counsel.

Printed by authority of the State of Illinois

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

STATEMENT OF THE CASE.

Page references are to the abstract filed in the Illinois Supreme Court, respondents not having been served with any record printed in this Court.

Petitioner sought a judgment declaratory of the 1957 provision of the Illinois Fireworks Act prohibiting the sale or use of sparklers except in connection with "supervised public displays" deprives petitioner, a manufacturer of

sparklers, of its business and property without due process of law, the complaint charging that the Act was unreasonable and confiscatory. (Abst. 1-16.) The trial court dismissed the plaintiff's complaint on the motion of the defendants, the Director of Public Safety and the Attorney General of Illinois. (Abst. 19.) The Supreme Court of Illinois held the Act reasonable and constitutional and affirmed the trial court's decision. (*Opinion, Petitioner's Brief, App. A.* 2a-3a, Opinion reported 13 Ill. 2d 516.)

The substance of the Federal questions decided by the Illinois Supreme Court appear in that Court's opinion and are correctly stated in petitioner's brief.

Petitioner's assertion that sparklers are "harmless" is petitioner's conclusion, with which the respondents, the trial court and the Supreme Court of Illinois disagree.

ARGUMENT.

I.

SPARKLERS ARE SO DANGEROUS, ESPECIALLY TO SMALL CHILDREN AND OF SUCH "MINIMAL USEFULNESS" THAT DUE PROCESS IS NOT DENIED BY THE PROHIBITION OF THEIR SALE OR USE EXCEPT AT "SUPERVISED PUBLIC DISPLAYS." THE ILLINOIS STATE LEGISLATURE DID NOT DENY DUE PROCESS BY DEEMING REGULATION AN INADEQUATE ALTERNATIVE TO SUCH PROHIBITION. THIS IS TRUE EVEN THOUGH THE VIRTUAL EFFECT OF THE PROHIBITION IS TO SUPPRESS THE PLAINTIFF'S BUSINESS.

The Court will take judicial notice that sparklers when lighted are wires heated to such a degree of incandescence as will ignite any ordinarily flammable material, such as clothing, and as will burn the hands, eyes, or the body of any human being who comes in contact with the heated core.

The Court will also take judicial notice that sparklers are very generally used by small children and that many injuries and deaths are the tragic consequences of children's use of these highly dangerous playthings.

The Court will also take judicial notice of the "minimal usefulness; weighed against their capacity for causing harm" of which the Supreme Court of Illinois speaks in its opinion in the instant case. (*Petitioner's Brief*, Appendix A, p. 3-a.).

Although the peril from fires ignited by sparklers is, as the Supreme Court noted, "particularly to small children,"

the danger is not confined to children alone. Even if it were so confined, the certainty that sparklers will fall into the hands of children even though children should be prohibited from purchasing or using them is a matter that must be judicially noticed. Adults and older children will supply younger children with sparklers despite statutory prohibitions. Injuries and deaths result from children's use of sparklers whether such use is or is not lawful.

Petitioner will doubtless reply, as it did in the Supreme Court of Illinois, that other commodities relatively safe in the hands of adults are dangerous in the hands of small children. But such commodities, such as matches, automobiles, dangerous electrical and other appliances and the like, unlike sparklers, are not articles or materials of "minimal usefulness". They are in general essential or at least highly useful amenities of our present civilization. If there exist other commodities that are absolutely certain to kill some small children and seriously to injure other children and are of no more use to our society than are sparklers and if, as is the case with sparklers, no feasible means exists of preventing children from access to such articles or materials, the sale, use or even the manufacture of such articles may likewise be constitutionally interdicted.

Petitioner's argument that "regulation would have accomplished the avowed purpose of the legislature" is arrantly unrealistic. Petitioner suggests no feasible means of keeping sparklers from small children if those articles are sold or used by the adult and adolescent public.

Petitioner says, "Pyrotechnic composition of sparklers could be restricted; size and weight could be regulated; time of sale could be confined." *(Petitioner's Brief*, p. 12.)

But *any* sparkler, despite its "pyrotechnic composition", when lighted, is, by petitioner's own definition of the term "sparkler", "a wire, partly coated with a composition,

which, when ignited, it emits sparks as it burns, and as it burns consumes itself." Any wire that burns hotly enough to consume itself is capable of burning a child or igniting his raiment. The size and weight of the wire could indeed be regulated but not by any measures that would prevent the wire from setting fire to a child.

The "time of sale" could of course be "defined". But the time of sale has nothing whatever to do with the dangerous character of sparklers. If sparklers are dangerous on Christmas day, they are dangerous on the Fourth of July.

The State may prohibit any traffic in commodities that the General Assembly reasonably deems dangerous to public health. In *Austin* v. *Tennessee*, 179 U. S. 343, this Court sustained an Act prohibiting the selling, giving away or otherwise disposing of cigarettes. Similarly, it was held that states might prohibit the sale of intoxicating liquors even before the Eighteenth Amendment. *Mugler* v. *Kansas*, 123 U. S. 623, *Kidd* v. *Pearson*, 128 U. S. 1.

The Act exempts from its provisions the sale of sparklers for and their use in "supervised public displays." (Ill. Rev. Stats. 1957, Ch. 38, Par. 28 Vol. I, p. 1572, Petitioner's Brief, p. 9 a.) This exemption is reasonable. Use of sparklers except under public supervision is inherently dangerous to children and may reasonably be prohibited. Indeed, the exemption, although reasonable, would not be necessary to the validity of the Act; for the danger of sparklers to children is so great that a legislature may reasonably declare them absolutely contraband.

The prohibition of sparklers has been sponsored in Illinois and generally throughout the United States by societies for the prevention of blindness and other civic organizations informed as to the hazards of sparklers and other fireworks and dedicated to the abolition of those hazards. The legislation is constitutional.

II.

IT IS OF NO MOMENT THAT THE ACT DEPRECIATES PETITIONER'S PROPERTY WITHOUT COMPENSATION.

Where the business may be prohibited or a commodity made contraband by the exercise of a state's police power, the prohibition may be applied to those who have at the time of enactment substantial capital invested in plants for the operation of business or the manufacture of the interdicted article. In *Austin* v. *Tennessee*, 179 U. S. 343, this Court, citing *Mugler* v. *Kansas*, 123 U. S. 623, and *Kidd* v. *Pearson*, 128 U. S. 1, declared that measures suppressing traffic in articles rendered illicit by their enactment "might be enforced against persons who, at the time, happen to own property whose value consisted in its fitness for manufacturing" such articles.

III.

IT IS OF NO CONSEQUENCE THAT THE SALE AND USE OF SPARKLERS WAS "EXPRESSLY SANCTIONED" BY THE ILLINOIS FIREWORKS ACT PRIOR TO THE ENACTMENT OF THE AMENDMENT ASSAILED IN THIS CASE.

Petitioner contends that the fact that the General Assembly exempted sparklers from the regulations and prohibitions of earlier fireworks acts vests in petitioner a constitutional right to continue its business of selling sparklers directly or indirectly to the general public although the legislature of Illinois now deems sparklers to be so dangerous that their use should be restricted to "supervised public displays". Petitioner says, "Certainly a citizen has a right

to rely upon statutory pronouncement. Certainly, he has a right to expect that any investment made in reliance upon statutory pronouncement will be protected in so far as circumstances remain the same." (*Petitioner's Brief*, p. 14.) Petitioner cites no authority sustaining this contention and where the police power is exerted, no such authority has been found.

There is no vested right, as the result of prior statutes or otherwise, to continue a business that is injurious to the public welfare. Such business may be prohibited or destroyed without compensation. *Brand* v. *Union Elevated R. R. Co.*, 238 U. S. 586, sustaining the validity of an ordinance whose effect was to destroy without compensation the utility of railroad property that was dangerous to the public. *Beer Co.* v. *Massachusetts* 97 U. S. 25, sustaining legislation destructive of a brewery company's business although the brewery had an antecedent charter by act of the legislature.

It is of no consequence that sparklers are no more dangerous now than they ever were and may even be safer. The legislature may take cognizance of long existing evils and prohibit their continuance. Most of the modern health and safety measures would be unconstitutional as applied to established businesses if petitioner's contention had merit. See *Williams* v. *Lee Optical Co.*, 348 U. S. 483, sustaining legislation that prohibited anyone other than a licensed optometrist or ophthalmologist to fit lenses to a face or to deflect or to replace into lenses or other optical appliances except upon a written prescription by a licensed optometrist or ophthalmologist.

IV.

REPLY TO SUNDRY CONTENTIONS AND SUGGESTIONS.

No federal constitutional question is raised by petitioner's suggestions that sparklers are not "fireworks" and were not so deemed in earlier acts of the Illinois legislature. The intent of the legislature is clear that the sale or use of sparklers except at "supervised public displays" is prohibited, whether sparklers are fireworks or not. No federal question is raised by the contention that sparklers are not fireworks. Whether they are fireworks or not, they are dangerous.

Nor is it important that the Interstate Commerce Commission has not in a particular regulation deemed sparklers "the composition of which does not exceed 100 grams each and which contain no magnesium or magnesium and a chlorate or perchlorate are not subject to the regulations". (See *Petitioner's Brief*, p. 15.)

Petitioner's assertion that "the sparklers manufactured by petitioner are safe, useful and in no way implicitly or intrinsically dangerous or harmful" is a conclusion that is at variance with the determination of the Illinois legislature. That determination is reasonable and therefore constitutional.

Petitioner seeks the right to continue to burn, blind and otherwise injure children. Due process of law does not protect this right.

V.

THE QUESTIONS RAISED BY PETITIONER ARE NOT SO FAR FAIRLY DEBATABLE AS TO ELICIT CERTIORARI.

Sparklers are so clearly dangerous to children and it is so far self-evident that the legislature may reasonably forbear their use or sale except at "supervised public displays", that no occasion exists for the granting of *certiorari* in this case.

Petitioner has seen fit to forbear its right of appeal as distinguished from *certiorari* in this case, which right would have existed if the question of the constitutionality of the instant measure were fairly debatable, under Section 1257 (2) of the Judicial Code. (28 U.S.C.A., Sec. 1257(2).)

Conclusion.

For reasons suggested in this brief, it is respectfully submitted that *certiorari* in this case should be denied.

Respectfully submitted,

LATHAM CASTLE,
Attorney General of the State of Illinois,
160 N. La Salle Street, Suite 900,
Chicago 1, Illinois.
Counsel for Respondents.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

CERTIFICATE OF SERVICE PROOF.

I, William C. Wines, a member of the bar of this Court and an Assistant Attorney General of the State of Illinois, hereby certify that on the 12th day of September, 1958, I served five copies of the above Brief in Opposition to Petition for a Writ of Certiorari on James C. Murray, by mailing the same to him, sufficient postage prepaid, at his address of record, 111 W. Washington Street, Chicago, Illinois, and five copies of the said brief on Erwin N. Greenberg, 120 S. La Salle St., Chicago, Illinois.

WILLIAM C. WINES,
Assistant Attorney General of the State of Illinois.

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Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 292

ACME SPECIALTIES CORP., an Illinois Corp.,
Petitioner,

vs.

JOSEPH BIBB, Director of the Department of Public Safety, and

LATHAM CASTLE, Attorney General, State of Illinois,
Respondents.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

JAMES C. MURRAY
111 West Washington Street
Chicago, Illinois
Attorney for Petitioner

Of Counsel:
ERWIN H. GREENBERG
120 South La Salle Street
Chicago 3, Illinois

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CERTIFICATE OF SERVICE APPENDED.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

REPLY TO SUNDRY CONTENTIONS AND SUGGESTIONS.

Respondents have predicated their entire argument in opposition to the Petition for a Writ of Certiorari to the Supreme Court of Illinois on the supposition that this Court will take judicial notice that many injuries and deaths are the consequences of the use of sparklers by children. It is respectfully urged that the supposition is false.

To say that a Court will take judicial notice of a fact is merely another way of saying that the usual forms of evidence will be dispensed with if the fact is one of public concern and notoriety which is known generally by all well-informed persons. (*Shapleigh* v. *Mier*, 299 U. S. 468; 16 Am. Jur., Evidence, Sec. 16.)

No proof was offered in this case as to the number of injuries or deaths caused by sparklers. Indeed, no proof either that they are safe or are dangerous was permitted as the complaint was stricken and the case dismissed on respondents' motion. If evidence had been permitted, it would have appeared that the number of injuries and the number of deaths throughout the entire United States attributable to sparklers are so negligible, that no records are kept by any responsible agency in the United States to categorize accidents caused by sparklers. Indeed, the National Safety Council stopped keeping records of such accidents in 1946 because the number of accidents laid directly to sparklers had reached the irreducible minimum.

Despite respondents' unsupported assertions to the contrary, a sparkler is not inherently dangerous. In the few instances where cases have arisen regarding the nature of sparklers, it has been uniformly held that a sparkler is not inherently dangerous. (*Beznor* v. *Howell*, 233 N. W. 758, 203 Wis. 1; *Henry* v. *Crook*, 202 App. Div. 19, 195 N. Y. S. 642; *Schmidt* v. *Capital Candy Co.*, 166 N.W. 502, 139 Minn. 378). In the *Schmidt* case the action was against a manufacturer of sparklers for burns caused a seven year old girl by a sparkler coming in contact with her dress and setting it on fire. It was contended by plaintiff that a sparkler is inherently dangerous. In regard to this contention the court said at page 381:

"* * * We do not think the article sold in the instant case so inherently dangerous as to render the seller liable without proof or knowledge on his part of some concealed danger, not apparent from mere inspection. There is no such proof in this case. So far as we are advised by the record, the danger of setting off the sparkler is no greater than that which is found in the ordinary match, carelessly lighted."

In *Henry* v. *Crook*, 202 App. Div. 19, 195 N. Y. S. 642, the court said at page 643:

"It is not necessary for us in this case to hold, and we do not hold that the sparkler itself was inherently or imminently dangerous. They are no more dangerous in themselves than the small firecracker or the ordinary match."

In *Beznor* v. *Howell*, 233 N.W. 758, 203 Wis. 1, the court exonerated a manufacturer of sparklers from liability for injuries resulting from the use of sparklers. The court said at page 760:

"In harmony with the holding of the trial judge and also in harmony with the language found in the two cases just considered (*Henry* v. *Crook* and *Schmidt* v. *Capital Candy Co.*) we have no hesitation in deciding that an ordinary sparkler (in the absence of negligent preparation for market, defective construction or hidden or concealed defects) is clearly not an inherently dangerous instrument, and is in fact no more dangerous (if as dangerous) than the small firecracker or a common match. The only possible danger from a burning sparkler which is not defective is in permitting it while burning, to touch the clothing or other combustible material or some part of the human body; that a sparkler can be lighted only by a match, candle, fire or burning sparkler is very clear; that a sparkler, while burning and at the point of burning or emitting sparklers, is very hot, in fact red hot, is perfectly obvious to any one."

No matter what article is manufactured today and no matter how safe in and of itself it may be, if used negligently or carelessly, it will cause injuries and economic waste.

It is petitioner's contention that there is nothing inherently harmful or dangerous to the public welfare about a sparkler as such, and particularly about petitioner's sparklers. If used carelessly or negligently it, of course, becomes an instrument of harm, as will everything else known to man today. The Legislature cannot presume that a sparkler will be used carelessly or negligently and thus become harmful to the public welfare. It must assume that it will be used properly. If used properly, a sparkler is in no way harmful to the public welfare and thus is not subject to the police power, or at least subject to the extent of complete suppression.

By virtue of respondents' motion to dismiss in the trial court, it was admitted that petitioner's sparklers are not dangerous or harmful to the public but, on the contrary, are of beneficial and useful value.

We ask this Court to take judicial notice of the vast number of accidents, injuries, property loss and even deaths caused by such relatively "safe" items as matches, cigarettes, stoves, heaters, automobiles, bicycles and the like. No hue and cry has gone up to ban the sale of these items, which are infinitely more dangerous to the public welfare than sparklers. Indeed, if any attempt were made to completely prohibit their sale under the guise of protecting the public welfare and safety, such attempt would be immediately struck down.

Those items that are inherently dangerous are to be distinguished from those that are not. The State is deemed to have power to suppress those things that are inherently

dangerous. It does not have the power to completely suppress those that are not. (*Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402).

It is contended that the matters that respondents ask this Court to take judicial notice of are not of such public concern and notoriety which is known generally by all well-informed persons. Therefore, this Court may not take judicial notice of such matters, and consequently there is a complete failure of proof in the record to support respondents' contention that sparklers are inherently dangerous and cause many injuries and deaths to children.

As heretofore stated in the Petition for Certiorari, the sale and use of sparklers were made lawful at all times in Illinois by specific legislation since 1935. Various amendments were enacted in subsequent years and in each instance, the legality of the sale and use of sparklers was continued and reaffirmed. This is an entirely different situation from that which existed in the cases cited by respondents (*Brand* v. *Union Elevated R. R. Co.*, 238 U. S. 586, *Beer* v. *Massachusetts*, 97 U. S. 25, *Williams* v. *Lee Optical Co.*, 348 U. S. 483.) In all of these cases, the matters involved were legal prior to the legislation in question by virtue of the fact that there was no legislation of any kind regulating them. The statutes being attacked in those cases were the first to affect the particular business or profession involved. That is not true in this case. Here, in reliance upon definitive and permissive legislation reaffirmed through subsequent amendments over a period of 22 years, petitioner commenced its business and invested large sums in its improvement and expansion.

The situation here involved is the same as that in *Dobbins* v. *Los Angeles*, 195 U. S. 233. In the *Dobbins* case, the petitioner had purchased land for the purpose of erecting gasworks, relying upon an ordinance that permitted such use of such land. After the purchase and commencement of construction, the ordinance was amended so as to prohibit such use for petitioner's land. The Court held that the change in the ordinance after the petitioner had purchased the property and gone forward with the erection of the works in reliance upon the ordinance brought it within that class of cases where the court may restrain the arbitrary and discriminatory exercise of the police power, which amounts to a taking of property without due process of law and an impairment of property rights protected by the Fourteenth Amendment to the Federal Constitution.

CONCLUSION.

For reasons suggested in this brief and the Petition for Certiorari, it is respectfully submitted that Certiorari in this case should be granted.

Respectfully submitted,

JAMES C. MURRAY
111 West Washington Street
Chicago, Illinois
Counsel for Petitioner

ERWIN H. GREENBERG
Of Counsel.

CERTIFICATE OF SERVICE PROOF

I, JAMES C. MURRAY, a member of the Bar of this Court hereby certify that on the 3rd day of October, A. D. 1958, I served five copies of the above Reply Brief on Latham Castle, Attorney General of the State of Illinois, by mailing the same to him, sufficient postage prepaid at his address of record, 160 North La Salle Street, Chicago, Illinois.

JAMES C. MURRAY
Counsel for Petitioner